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IN THE

Supreme Court of The United States

October Term, 1960

Number [redacted] ///

FULLER HOLT, CLAUDE HOLT, MILTON JAMES HOLT, FRANK T. KEENER, E. D. HOLT and MRS. E. D. HOLT,

Petitioners in Certiorari

versus

UNITED STATES OF AMERICA

Petition for Certiorari to the United States Court of Appeals for the Fifth Circuit

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Now come petitioners, and petition this Honorable Court for the writ of certiorari to the United States Court of Appeals for the Fifth Circuit

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SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED

Appellants Fuller Holt, Claude Holt, Milton James Holt, Frank T. Keener, E. D. Holt and Mrs. E. D. Holt were jointly indicted, along with seven other persons who were acquitted by the jury, for conspiring to violate

the internal revenue laws of the United States relating to the manufacture, possession and concealment of non-tax paid distilled spirits and related substantive offenses. All the named appellants were found guilty by the jury on count number one, charging conspiracy. Appellant Fuller Holt was found guilty on count number three charging him with possession of property intended for use in the manufacture of non-tax paid distilled spirits. Appellants E. D. Holt and Mrs. E. D. Holt were found guilty on count number five charging them with possessing property intended for use in the manufacture of non-tax paid distilled spirits. Appellants E. D. Holt and Mrs. E. D. Holt were found guilty on count number seven charging them with possessing 480 gallons of non-tax paid distilled spirits. Appellants E. D. Holt, Fuller Holt and Milton James Holt were found guilty on count number eight charging them with possessing an unregistered still.

The evidence, construed most favorably for the Government, revolved around the operation of three distilleries. The first still was set up, according to the evidence, about December 25, 1958, in Murray County, Georgia. This still was seized by Government agents on January 20, 1959, on information reported by co-conspirator J. H. Padgett to Duff Floyd, one of the Government agents and witnesses. Insofar as the operation of this distillery was concerned the evidence shows the following defendants to have been the only persons named in connection therewith:

(1) J. H. Padgett, (2) Austin Lowman, (3) E. D. Holt, (4) James Wofford, (5) Claude Call, (6) Roose-

velt Keener, (7) Austin Whitaker, (8) Frank Keener, (9) Fuller Holt and (10) Claude Holt.

This distillery, according to the evidence, ceased operation after its seizure by the federal agents.

The second distillery, located in Gilmer County, Georgia, was set up during March, 1959, and lasted only two or three weeks. The following alleged conspirators were concerned in the operation of this distillery:

(1) J. H. Padgett, (2) Horace Parks, (3) Milton Holt, (4) E. D. Holt and (5) Claude Call.

This distillery, according to the evidence, ceased operating sometime during March, 1959.

The third distillery, located at what was called the Old Cicero Wright place, in Gilmer County, Georgia, began to function about April 29, 1959, and ceased operating on May 17, 1959. The alleged conspirators in that transaction were as follows: (1) J. H. Padgett, (2) Claude Call, (3) E. D. Holt, (4) Milton Holt, (5) Fuller Holt, (6) Mrs. E. D. Holt, (7) Claude Holt and (8) Doyle Evans.

J. H. Padgett, alleged in the indictment as a co-conspirator, but not as a defendant, testified on behalf of the Government as a witness.

Padgett's testimony developed the following facts: That the witness went to work at still No. 1 located in Murray County about December 26th, 1958, and that the parties named above were involved in that still; that the witness became dissatisfied and shortly thereafter he contacted Investigator Floyd; that on January 20, 1959, pursuant to his information, the still was destroyed by

federal agents; that the witness was paid $76.00 for this information (R. 93). At the time Investigator Floyd paid Padgett $76.00 Padgett told Floyd he had been helping to make liquor, (R. 94) but Floyd did not discuss whether or not Padgett would be prosecuted for it. Padgett was to get paid more money "to get the Holt gang," (R. 95), that Padgett did not know what his "remuneration" would be, but that he knew "it would be right," (R. 96). Another Government agent, Warren Cagle, testified that the "purpose of paying" such money is "in return for information or help to the Government," and that "it has to lead to the seizure, it is a form of contract between this person and the Government that he will perform certain services, and these services have to be terminated or his obligation met before he is paid," and that "usually the officer to whom the person contracts has the judgment and the authority to make the contract between the Government and the agent" (R. 230). Padgett was not prosecuted for working at any of these distilleries "*because he was paid by the Government to work at and help to operate the distillery*" (R. 242), Padgett was being paid by the Government to assist in the operation of the still, and the federal agents met with Padgett on some of the occasions to learn of their own "knowledge what the plans for the operation of the distillery and all the related activities, find when they were going to take place and such" (R. 243). The agents involved in the contacts between Padgett and the Government were Investigators Floyd, Davis and Cagle, and all three of the investigators at the time "were acting in behalf of the United States," (R. 244) and Padgett was advised by one of the agents that he "*might be prosecuted for setting up or assisting in the operation of a still at that time,*" (R. 244).

The federal agents knew about the third still located at the Old Cicero Wright place, and were observing it all the time from the time the shed was built by Padgett because Padgett had constant contact with them. (R.84) After the seizure of still No. 1 on January 20, 1959, Padgett left and did not work any more for the alleged conspirators until after March 1st, (R. 106) so the transaction after March 1st involving still No. 2 was an entirely separate and distinct transaction, (R. 107) involving different persons.

During the month of March, 1959, Padgett moved away from the location of the still in Murray County, designated as still No. 2, and "that was the end of that agreement that (he) had had with those people"; (R. 111). Padgett then moved back to Dawson County. During all three of these separate transactions Padgett was getting paid ten cents a gallon to make liquor and he was "*also getting paid from the Government.*" (R. 114.)

At the conclusion of the evidence for the Government the appellants all moved for judgments of acquittal which were overruled by the court.

The United States Court of Appeals for the Fifth Circuit, in affirming the convictions, held that the petitioners' contention that the participation of a "paid government informer in their illegal activities" does not estop the government from prosecuting them, even though the government agents were themselves conspiring with and paying a government informer who was alleged in the indictment as a co-conspirator, and held that "What the government paid for, and what it received in this case was information." The Court of Appeals then held: "We find nothing in the eliciting and utiliza-

tion of this information which should estop this prosecution."

The Court of Appeals also held that the evidence disclosed one conspiracy to produce "moonshine", and that it did not disclose three separate conspiracies so as to make the joinder in one count prejudicial to those defendants who were not implicated in all the phases of the alleged operation.

A petition for rehearing was filed by petitioners, and denied by the United States Court of Appeals.

JURISDICTION

(a) The judgment of the Court of Appeals was entered on March 23, 1961. A petition for rehearing was denied on April 25, 1961. The jurisdiction of the Supreme Court of the United States is invoked under 28 U.S.C. 1254 (1), and under and by virtue of 18 U.S.C. 3772 and within the time prescribed in Rule XI of the Rules of Practice and Procedure, promulgated May 7, 1934 (292 U.S. 661, 666, 54 S.Ct. XXXIX.)

(b) The statute of the United States, the validity of which is involved in this application for certiorari, is as follows:

> 18 U.S.C.A. #371. CONSPIRACY TO COMMIT OFFENSE OR TO DEFRAUD UNITED STATES
>
> If two or more persons conspire either to commit any offense against the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

(c) This petition for certiorari is being filed in this

Court within 30 days from the date of the judgment denying the petition for rehearing.

(d) The nature of the case and the rulings of the Court were such as to bring the case within the jurisdictional provisions relied upon, and the grounds upon which it is contended that the questions involved are substantial are as follows:

1.

The United States Court of Appeals for the Fifth Circuit has decided an important question of federal l concerning conspiracy prosecutions so as to permit the government to become a party to a conspiracy without estopping the government from using their own paid agents and informers acts against other named conspirators.

THE QUESTIONS PRESENTED

1. Whether the government will be permitted to successfully prosecute and convict persons on a conspiracy to defraud the government charge where government agents and paid government informers were parties to such conspiratorial agreement; named in the indictment as co-conspirators and advising and assisting in the commission of the substantive offenses and objects of such conspiracy, or is the government estopped from such prosecution because of their participation and financial aid in such scheme?

2. Is a conviction valid on a one count conspiracy charge, where the evidence shows three separate and distinct conspiracies, with different sets of conspirators in each, instead of a single, continuous and uninterrupt[illegible] scheme or agreement?

ARGUMENT

The evidence in the case clearly indicates that federal agents employed J. H. Padgett to work with petitioners and to assist them in the setting up and operating of illicit stills. The government charges Padgett in the indictment with being a co-conspirator. This is not a case of mere entrapment, where the same rules should apply, but is a case where the government seeks to uphold a conviction against these petitioners for conspiring to do that which the government itself sanctioned and furthered.

While there is no case in point from this court holding this to be the federal law it was held in the case of *Butts* v. *United States*, 273 Fed. 35, that

> "The first duties of the officers of the law are to prevent, not to punish crime. It is not their duty to incite to and create crime for the sole purpose of prosecuting and punishing it."

The testimony in the case shows that Padgett was being paid by the government agents *to assist in the operation of a distillery*. The government argues that this was nothing more than furnishing the opportunity to persons who were ready, willing and able to violate the law, but not only did the government offer the opportunity; they also furnished the man power to build the instrument of crime without which no offense would or could have been committed; namely, the erection of the still.

The evidence clearly shows that Padgett was under an expressed government contract *to assist the petitioners in the erection of one of the stills*, and for that reason his offense is pardoned as being in the nature of *the*

commandment of the law, but the party or parties who assisted him in the other details of the building of the illegal device must be punished by that same government in order to suffer the consequences of the government's wrongful and illegal scheme.

It is illogical to hold one responsible for the acts of others who are aiding and abetting them, and at the same time hold the aider and abetter blameless because he was an aider and abetter of the sovereign.

If Padgett committed no crime because his sovereign commanded him to do the acts otherwise prohibited, how can that same sovereign complain that others aided him in carrying out their wishes? Padgett's plan in agreeing to violate the internal revenue laws was that of the government, and carried with it the authority of law. This made the government a co-conspirator in whatever plan or scheme was contemplated by all. Padgett's action in building the still and helping to set it up and operate it was the action of the government, and also carried with it the authority of the law, and if in so doing Padgett was aiding and abetting the owners of the still to operate it, the government was also an aider and abetter in its operation and was equally guilty. How can that same Government seek retribution against some, and pay bounty to others for those acts which they themselves have participated equally.

As to those defendants whose connection with such a scheme did not take place until after the Government agents had entered the case and as to that evidence which the jury must of necessity have had to consider, after the events of January 20, 1959, there is no fair way to separate them. To say on the one hand that it is for the jury to consider whether appellants were innocent per-